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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1996

MMP INVESTMENTS, INC.,

*Petitioner,*

v.

LANDER CO., INC.,

*Respondent.*

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

## PETITIONER'S REPLY BRIEF

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## I. RESPONDENT DOES NOT CHALLENGE THAT THERE IS A SPLIT IN THE CIRCUITS ON WHETHER ARBITRATION AWARDS MUST BE CONFIRMED IN THE DISTRICT IN WHICH THE AWARD WAS ENTERED.

### A. Respondent Nowhere Contests That A Split Of The Circuits Exist.

Eight years ago the Ninth Circuit recognized the existence of a "split of authority among the circuits as to whether section 9's venue provision is mandatory." *Sunshine Beauty Supplies, Inv. v. United States District Court*, 872 F.2d 310, 312 (9th Cir. 1989). This split is certainly long-standing enough to warrant Supreme Court review.

Here it is undisputed that, while the arbitration award was *made* in New York, Respondent sought to confirm that arbitration award in the Northern District of Illinois. (App. at 7). Respondent concedes this point. (Respondent Br. at 8). Under decisions from the Third, Fifth, Sixth, Eighth and Ninth Circuits, Respondent would find venue *improper* in the Northern District of Illinois to confirm an arbitration award made in New York because those Circuits hold that the language of § 9 is deemed "mandatory." (*See,* Petition at 12-13). On the other hand, the Seventh Circuit expressly permits venue to lie in a district *other than* where the arbitration was made. *See In re VMS Sec. Litig.*, 21 F.3d 139, 145 (7th Cir. 1994).[1] Respondent's failure to address, much less explain, the differing interpretations among the Circuits should be construed as a concession that confusion exists on this important issue of federal venue. (Respon-

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[1] The Seventh Circuit opinion below expressly acknowledges the existence of the split of authority on this very issue, unabashedly stating that its interpretation of § 9 is directly "contrary" to the Ninth Circuit's reading of the same statutory provision. (App. at 8).

dent's Br. at 22); *see also PepsiCo, Inc. v. Redmond*, 54 F.3d 1262, 1277 (7th Cir. 1995).

Respondent reinforces the need for Supreme Court guidance by limiting its analysis to cases holding that venue under § 9 is permissive, while completely ignoring the wide array of precedent that limits venue under § 9 to the district where the arbitration award was made—in this case, concededly New York. (Respondent's Br. at 9; *compare,* MMP Petition at 13-15). The Seventh Circuit's decision has dealt one more blow to certainty and predictability on the issue of venue under § 9. By accepting MMP's Petition, this Court can settle authoritatively this deepening split among the Circuits, and thereby clarify when venue is proper in actions confirming arbitration awards brought under the FAA.

### B. MMP Did Not Waive The Issue Of Venue Under § 9 Of The Federal Arbitration Act.

Unable to dispute the direct conflict among the Circuits in interpreting § 9's venue provisions, Respondent tries to minimize the significance of the question presented by suggesting that MMP waived the issue by not having challenged venue. (Respondent's Br. at 7). This argument is incorrect for at least two fundamental reasons.

First, MMP did not file a motion under the FAA challenging venue because it was *Respondent's* consistent position in the district court that it was seeking to enforce the arbitration award *under the Convention.* Respondent's Petition to Confirm the arbitration award bore this out, stating that "[t]his proceeding arises under the Convention on the Recognition and Enforcement of Foreign Arbitral Awards and under chapter 2 of Title 9, United States Code, *and particularly Section 207.*" (emphasis added) (Respon-

dent's Petition, ¶ 4). Title 9 U.S.C. § 207 sets forth the standard for enforcing awards under the Convention, not the FAA. Nor did Respondent, in opposing MMP's motion to dismiss before the district court, assert that it had a right to confirm the arbitration award *by virtue of the FAA*. Rather, Respondent steadfastly maintained that this proceeding arose under the Convention. Even the district court was under the impression that the *sole* jurisdictional ground being asserted to confirm the award was the Convention, and not the FAA. (App. at 13, n.1). In its brief before the Seventh Circuit, MMP reiterated its position that Respondent failed to present to the district court any argument entitling Respondent to relief under the FAA. (*See* MMP Seventh Circuit Brief at 19-22).

As Respondent never argues to the district court that the FAA provided a basis to confirm the arbitration award, MMP's failure to challenge venue under § 9 at the outset of the confirmation proceedings can hardly be considered a "waiver" of whether venue was proper. Respondent's hue and cry that MMP is now trying to use the § 9 venue provision as a delaying tactic is belied by the fact that *Respondent* never affirmatively relied upon the FAA before the district court as a ground to confirm the arbitration award. Instead, Respondent raised the FAA as an alternative ground of confirmation only after it lost in the district court and found itself on appeal in the Seventh Circuit.[2]

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[2] In fact, the Seventh Circuit's opinion confirmed that MMP sought to have the FAA issues (which necessarily included the venue question under that Act) *deferred* pending a ruling on whether the Convention empowered the district court to confirm the arbitration award. (*See* App. at 3: "MMP asked the district judge to defer ruling on its motion to vacate [the arbitration award under the FAA] until the judge decided whether the New York Convention was applicable.").

Second, to find that MMP somehow elected to "waive" the right to challenge venue under § 9 of the FAA would be fundamentally unfair considering that the Seventh Circuit's opinion in one fell swoop disposed of the venue issue in the following sequential fashion: (a) raising the § 9 venue issue *sua sponte* in its opinion *without the parties ever having had the opportunity to even brief the issue*, (b) acknowledging the split of authority among the Circuits on whether § 9 provides for permissive or mandatory venue, and (c) concluding its analysis by rejecting outright the Ninth Circuit's reading of § 9 in *Sunshine Beauty Supplies*. (App. at 8). Apparently, the Seventh Circuit ruled on the § 9 venue issue to prevent MMP from raising that issue upon remand. Depriving a party of the opportunity to respond to venue issues *before* a court rules on them has generally been condemned. *See, e.g., Lipofsky v. New York State Workers Compensation Bd.*, 861 F.2d 1257, 1258 (11th Cir. 1988); *Costlow v. Weeks*, 790 F.2d 1486, 1488 (9th Cir. 1986).

In short, MMP is entitled to challenge the § 9 venue issue in this court because: (1) Respondent urged the applicability of the FAA before the district court as a ground to confirm the arbitration award for the first time in its appeal *after* the district court rejected its Petition brought under the Convention; and (2) the Seventh Circuit *sua sponte* raised and rejected the § 9 exclusive venue issue in a single gesture without first affording MMP the opportunity to contest the issue on appeal. This Court is not only a proper forum to raise the venue issue, it is likely the *only* forum that can now address that very question.

## II. RESPONDENT'S FAILURE TO CITE A SINGLE CASE SUPPORTING FEDERAL JURISDICTION UNDER THE CONVENTION IN A DOMESTIC DISPUTE FORTIFIES THE NEED FOR SUPREME COURT REVIEW.

The second question presented in MMP's Petition strikes at the heart of federal jurisdiction: whether the Convention empowers federal courts to confirm arbitration awards despite their possessing all of the following purely *domestic* attributes: (a) an arbitration agreement entered into exclusively between United States citizens in the United States; (b) an arbitration award made in the United States; and (c) an arbitration agreement governed exclusively by United States internal law. The district court understandably said "no," finding that the Convention should not be expanded "to include an award *between United States' parties issued in the United States*." (App. at 20) (emphasis added). In reversing, the Seventh Circuit has established an unprecedented basis of federal jurisdiction—one that can find no support in caselaw from this Court, nor in the legislative history of the Convention. Indeed, even the district court acknowledged that "this case [is] one of first impression." (App. at 16). Nothing in the Seventh Circuit's opinion detracts from that finding. (App. at *e.g.*, 9-11). Even Respondent acknowledges that the Convention's language is ambiguous. (Respondent's Br. at 23). The Seventh Circuit has expanded federal jurisdiction under the Convention to embrace any commercial dispute (regardless of the amount in controversy (9 U.S.C. § 203)) exclusively between U.S. citizens that happens to include partial performance of their agreement in a foreign country. This unduly focuses on the *situs* of the parties' performance, rather than the *differing nationalities* of the disputants.

Respondent expends nearly 15 pages of its opposition brief attempting to explain why the New York Convention must apply to this domestic commercial dispute. Cases from

various Circuits are offered as support for Respondent's position that the Convention confers wide-ranging federal jurisdiction. (Respondent's Br. at 10-18). Respondent further resorts to parsing the language of the Convention in the hope of persuading this Court that the Seventh Circuit was right in interpreting the Convention to include domestic disputes. (Respondent's Br. at 21-22). Indeed, Respondent's lengthy discussion of the Convention seems more like a brief on the merits after a petition for writ of certiorari has been granted, than an opposition brief in the first instance.

But conspicuously absent from Respondent's exposition is a single case—from this Court or any other Circuit—that has expanded the Convention in a manner even remotely similar to that which is now binding law throughout the Seventh Circuit. Until now, no federal court held that the Convention conferred federal jurisdiction to confirm an arbitration award exclusively between United States citizens, where the parties' arbitration agreement was made in the United States and governed solely by United States law. Such a lack of precedent, though, is hardly fortuitous, given that the Convention, when read along with the United States' Declaration of Accession, has long been construed as *excluding* enforcement of arbitration awards *made in the same country in which the award was entered*—which is precisely what happened here. *See* Albert Jan van den Berg, *When Is an Arbitral Award Nondomestic Under the New York Convention of 1958?*, 6 Pace L. Rev. 25, 64 (1985) ("The New York Convention applies in the first place to arbitration awards which are *made in the territory of another Contracting State.*") (emphasis added) (*see also* App. at 20). This Court has acknowledged the importance of the United States' Declaration, treading carefully so as to avoid "subverting" its intent. *See, e.g., Mitsu-*

*bishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 639 n.21 (1985) ("But we decline to subvert the spirit of the United States' accession to the Convention. . . ."). The absence of a single federal decision interpreting the Convention since its ratification in the fashion adopted by the Seventh Circuit lends added weight to the necessity for Supreme Court review. The course of conduct of party signatories to a treaty must be accorded considerable respect in divining the true intent ascribed to an international agreement. *See, e.g., O'Connor v. United States*, 479 U.S. 27, 33 (1986).[3]

While Respondent relies heavily on the decision in *Bergesen v. Joseph Muller Corp.*, 710 F.2d 928 (2d Cir. 1983), and claims that MMP has "no response to the teachings and holding" in *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982) (Respondent's Br. at 25), neither case supports the Seventh Circuit's interpretation of the Convention. In both *Bergesen* and *Ledee*, none of the parties seeking to enforce arbitration was a United States citizen; none of the arbitration agreements was executed in the United States, nor governed by United States law. Conversely, in each of the cases cited by Respondent, at least one of the parties to the arbitration agreement was a citizen of a country *other than the United States*, so as to justify invocation of the Convention's enforcement mechanism. For this reason, the string-cited cases cited by Respondent that it asserts as "applying the *Ledee* test" are entirely unpersuasive. (Respondent Br. at 18). Recent district court decisions confirm MMP's position that the Convention was designed only to apply when parties of nation-

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[3] *See also Zicherman v. Korean Air Lines Co.*, ___ U.S. ___, 116 S. Ct. 629, 634 (1996) (aid in interpreting treaty includes "post ratification understanding of the contracting parties").

alities *other than exclusively the United States* are involved.[4]

If allowed to stand, the Seventh Circuit's expansion of the Convention threatens to proliferate litigation in federal courts by freely permitting parties to seek confirmation of otherwise run-of-the-mill commercial disputes that arise solely between United States' citizens, based on agreements made entirely in the United States and controlled exclusively by United States law. This Court, however, has held that the Convention's goal is limited to the recognition and enforcement of "*international* contracts." *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 115 S.Ct. 2322, 2329 (1995) (emphasis added). It makes no sense to have an international treaty with 105 national signatories govern commercial disputes *exclusively between United States citizens*. Until the Seventh Circuit's holding, no federal decision had ever stretched the Convention that far.

Respondent concedes that the purpose of the Convention is limited to "international commercial arbitration agreements." (Resp. Br. at 19). Supreme Court review has now become crucial to restore the Convention to that limited role designed as a mechanism to settle disputes between "international", as distinguished from purely domestic, merchants. *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 519 n.15 (1974).

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[4] *See, e.g., Skandia America Reinsurance Corp. v. Caja Nacional de Ahorro y Segoro*, No. 96 CIV 2301 (KMW), 1997 WL 278054, at *4 (S.D.N.Y. May 23, 1997) ("The purpose of the New York Convention was to effectuate arbitration proceedings and their enforcement *between companies of different nationalities.*") (emphasis added).

## III. BY SUBMITTING TO ARBITRATION MMP DID NOT WAIVE ITS RIGHT TO CONTEST FEDERAL JURISDICTION UNDER THE CONVENTION.

According to Respondent, by agreeing to arbitration, "MMP has waived all jurisdictional objections to [Respondent's] right to judicial relief to enforce the arbitral award." (Respondent's Br. at 25-26). Respondent is plainly wrong for two elementary reasons.

First, federal subject matter jurisdiction cannot be "waived" by language contained in a parties' contract. *See, e.g., Coury v. Prot*, 85 F.3d 244, 248 (5th Cir. 1996). In granting MMP's motion, the district court dismissed Respondent's petition on *jurisdictional* grounds. (App. at 14: "*[T]he motion challenges the jurisdictional basis of the petition,* that is, whether this court has the authority to confirm the arbitral award under the Convention.") (emphasis added). Obviously, MMP did not "waive" the right to challenge the jurisdiction of the federal court to confirm the entry of an arbitration award under the Convention simply by entering into an arbitration agreement.

Second, both the Convention, as well as the FAA, expressly provide for limited judicial review of arbitration awards. *See, e.g., Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1253 (7th Cir. 1994); 9 U.S.C. § 11(b); Convention, Article V(1)(c). 9 U.S.C. § 207.

Given that MMP's challenge was that the award did not fall within the Convention's terms, thus rendering the federal court without jurisdiction, Respondent's argument that MMP "waived" the right to contest that jurisdiction by entering into an arbitration agreement should be summarily rejected.

## IV. CONCLUSION.

For the reasons stated above and those contained in the petition, MMP respectfully requests that the petition for a writ of certiorari be granted.

Dated: July 25, 1997.

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